

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

**SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947**

August 17, 2006

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**RE: State of Delaware, upon the relationship of the Secretary of
the Department of Transportation v. CEH/VWH Trust et al
C. A. No. 06C-04-011 THG - Condemnation**

Dear Counsel:

On July 21, 2006, the Court entertained the State's Motion for an Order of Possession concerning .1548 acres of land sought to be condemned pursuant to the eminent domain authority of the State of Delaware. Together with the Notice of Intention to take possession, the State filed with this Court the sum of \$17,600.00 based upon the State's estimated valuation of the property to be taken.

On behalf of the Defendants, Mr. Wilgus opposed the State's application and complained that the methodology of the State's estimate of \$17,600.00 was flawed.

Subsequently, each of you has provided the Court your respective positions concerning this issue. This is the Court's decision granting the State's application and I am entering an Order of Possession.

In making a decision concerning a writ of possession, the Court must look to 10 Del. C. §6110 as to the requirements for entry of possession, and Superior Court Civil Rule 71.1 concerning the condemnation of property. They are both set forth below.

10 Del. C. §6110 Entry into possession; requirements.

(a) At any time after the filing of any condemnation proceeding under this chapter, the plaintiff, upon the filing of a notice of intention to take possession of the property sought to be condemned, or any part thereof, on a day therein specified, and upon deposit in Court of the sum of money estimated by plaintiff to be just compensation for the property or the part thereof taken, has the right to enter into possession, occupy or take the property from and after such day, upon entry of an appropriate order by the Court, which order may be made ex parte and without notice.

Superior Court Civil Rule 71.1. Condemnation of property

In a condemnation proceeding instituted by a public agency, such as an agency of the State, a county, a municipality or a school district, an order of possession of the property to be taken shall be entered forthwith, pursuant to 10 Del. C. §6110(a), upon 10 days' written notice of intent to present such order, to be given to the property owner or his attorney of record, supported by an affidavit of necessity executed by the chief administrative officer of the condemning agency, unless the property owner by affidavits, depositions, and/or verified answer shall show good cause why such order of possession should not be entered forthwith. Any hearing on the issue of good cause shall be held without delay and on such affidavits, depositions, and/or verified answer. Disposition of the issue of good cause shall be made by the Court without delay.

This Rule shall be applicable solely to the condemnation proceedings brought by such public agencies.

In all such condemnation proceedings the burden shall be upon the property owner to overcome the presumption of regularity and the prima facie case of necessity for a public use presented by the institution of such proceeding.

Nothing herein contained shall affect the power of the Court, in its discretion, to enter an order of possession ex parte and without notice, as is provided by 10 Del. C. §6110(a), upon proper cause being shown by the public agency. (Added, effective July 20, 1962.)

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In this case, the Defendants have argued that the State used an improper methodology in valuing the property which is being taken. This is a partial taking case. The State's valuation of the entire property owned by the Defendants is \$250,000.00. Based on a square footage pro rata basis, the State determined the partial taking valuation to be \$17,600.00.

The Defendants argue that this methodology is flawed and does not fairly compensate the Defendants at this time for the taking. What is noteworthy is that the Defendants do not oppose the entry of the Order of Possession. Defendants argue since the State has used a flawed methodology that it would be more appropriate to deposit the full \$250,000.00 for the entire parcel into the Court.

Title 10, Section 6109(a) requires that the State deposit with the Court a sum of money estimated by the State to be just compensation for the part of the property taken.

Superior Court Civil Rule 71.1 allows the property owner to have a hearing which may be based upon affidavits and depositions to determine the necessity of the State's need for the property and whether or not the property owner has shown good cause as to why an Order of Possession should not be entered. Thus Rule 71.1's focus is not on the valuation or estimate made by the State at the time of the initial taking, but on whether or not the taking should take place at all. In this case, Defendants do not dispute the State's necessity for the taking.

I find that the Defendants' position of requiring the State to deposit the sum of \$250,000.00, i.e. the valuation of all of Defendants' property including that which is not being taken, is unreasonable. There is available to the parties substantial case law as to the proper valuation or appraisal methodologies permitted at the time of the trial. The Commissioners will ultimately determine the valuation of the property taken, but also consideration of any diminution in value of

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the remaining property based upon the taking.

The Statute requires that the State make an estimate as to the value of the property being taken at this time. The State has done so. Neither the Statute nor the Court's Rules require that the Court conduct a hearing at this time to determine if the State's current estimate is fair. The sum of money being deposited by the State will not be revealed to the Commissioners and therefore there is no potential prejudice to the Defendants when they have their day in Court. *State v. Rittenhouse*, 634 A.2d 338 (Del.1993).

It is not my intention to add another layer to the statutory procedure for condemnation because the Defendants cannot be prejudiced. The Commissioners will make a determination of the just compensation due the Defendants regardless of the deposit being made at this time.

The Order of Possession is hereby granted and I have executed the State's proposed Order today.

Yours very truly,

T. Henley Graves

THG:baj
Enclosure
cc: Prothonotary